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In the Supreme Court of the United States

OCTOBER TERM, 1945

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, APPELLANTS

v.

SEATRAIN LINES, INC.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF DELAWARE

MEMORANDUM FOR THE UNITED STATES AND INTERSTATE COMMERCE COMMISSION IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

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Pursuant to Rule 7, paragraph (3) appellants, the United States and Interstate Commerce Commission, file this statement opposing appellee's motion to dismiss or affirm. For a discussion of the nature and importance of the case and of the questions presented, we respectfully refer the Court to our jurisdictional statement. The following comments are directed to statements contained in appellee's motion to dismiss or affirm, which was served on appellants on March 11, 1946.

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In the motion to dismiss or affirm, it is stated that two and one-half years after the issuance of the original certificate by Division 4 on July 2, 1942, and after the expenditure of large sums by Seatrain in reliance upon the certificate, the Commission illegally canceled the original certificate and issued a new one changing the status of Seatrain from that of a common carrier of commodities generally to that of a car ferry. Section 309 (d) of the Interstate Commerce Act confers authority upon the Commission to impose terms and conditions at the time of the issuance of the certificate and "thereafter". Moreover, the original certificate issued by Division 4 on July 2, 1942, indicated on its face that it was not irrevocable, for it contained the following provision:

> It is ordered, That said carrier be, and it is hereby, authorized to perform the service specified above, subject, however, to such terms, conditions, and limitations as are now, or may hereafter be, attached to the exercise of such authority by this Commission.
>
> (Petition, Exhibit C.)

The facts are that while Division 4 on July 2, 1942, did authorize the issuance of a certificate to appellee, which appellee states in its motion "is the equivalent of a perpetual franchise", less than 18 months thereafter the full Commission notified appellee it would reconsider this case (Exhibit E to the petition). Appellee presented various objections to the reopening, which are mentioned

in our jurisdictional statement. Although the matter was set for hearing on two different occasions by the Commission, appellee, relying upon its position that the Commission had no authority to reconsider the provisions of a certificate once issued, declined to produce any evidence before the Commission. Consequently, as the Commission found, there was no evidence in the record before the Commission showing alleged commitments or expenditures made in reliance upon the certificate. Over appellants' objection, appellee was permitted to introduce evidence *de novo* in the District Court (through the testimony of appellee's president, Graham Brush) with respect to such claimed expenditures. We have assigned as error the ruling of the District Court permitting the introduction of such testimony, in view of appellee's declination to present it to the Commission, and this is one of the questions that this Court is called upon to decide. At this stage of the litigation, it is doubtful whether appellee has a right to rely upon such evidence, introduced for the first time in the District Court, as it does in Part II of its motion to dismiss or affirm, in support of its claim of large expenditures on the strength of the certificate.

In Part I of appellee's motion, it is argued that the Commission is entirely without statutory authority to revoke a certificate once issued to a common carrier by water. In the first place, the mere changing or limiting of a Division 4 certifi-

cate by the entire Commission does not constitute the revocation of a certificate. Instead, the certificate was merely corrected in order to assure to appellee the substantial parity of operations in the future which it had established in the past. Cf. *Alton R. Co.* v. *United States*, 315 U. S. 15, 22; *Noble* v. *United States*, 319 U. S. 88, 92. Secondly, Section 309 (d) of Part III of the Interstate Commerce Act, relating to the regulation of water carriers, authorizes the Commission "at the time of issuance [of a certificate] and from time to time thereafter" to impose such reasonable terms, conditions and limitations as the public convenience and necessity may require. It is submitted that this language warranted the Commission's taking the action it did here. See also Section 315 (c).

Appellee's motion depicts certain difficulties in connection with its being confined to the handling of freight in railroad cars. As this Court knows from prior decisions involving appellee, it has built up a special business of handling freight in loaded railroad freight cars. As was said in *United States* v. *Pennsylvania R. R. Co.*, 323 U. S. 612, 617, "The particular type of service introduced by Seatrain, and found by the Commission to be qualitatively superior, cannot be rendered without the privilege of carrying the very railroad cars which carry freight to its ports". Consequently, the entire Commission properly found that Seatrain was entitled to continue operation

as a common carrier by water, in interstate or foreign commerce, by self-propelled vessels, in the transportation of liquid cargoes in bulk; of empty railroad cars, and of property loaded in railroad cars received from and delivered to rail carriers and transported without transfer, between the ports of New York, N. Y.; New Orleans, Louisiana; and Texas City, Texas, by way of the Atlantic Ocean and the Gulf of Mexico (Petition, Exhibit B, p. 53). Appellee's argument that once a certificate issues, it is irrevocable in the absence of fraud, abandonment, etc., runs counter to the plain terms of Sections 309 (d) and 315 (c). Furthermore, if appellee's contention were correct that Section 315 (c) authorizes the Commission to suspend, modify or set aside only regulatory orders and not certificates, the District Court, which is confined to review of the Commission's orders under the Urgent Deficiencies Act (28 U. S. C. 44, 47), would have no authority to entertain this suit.

It is difficult to understand how the appellee could have made any extensive commitments in reliance upon Division 4's certificate. As this Court said in *Interstate Commerce Commission* v. *Hoboken R. Co.*, 320 U. S. 368, 376, "since February, 1942, Seatrain's vessels have been in Government service and Seatrain's service has been discontinued." This was during the very period that the entire Commission in this case was reconsidering the action of Division 4. In any event, appellee declined to present to the Commission

any testimony or evidence showing expenditures or commitments on the strength of Division 4's certificate, although afforded two opportunities to do so. Accordingly, the Commission concluded "The record therefore contains no specific showing in that respect" (Petition, Exhibit B, p. 50). The District Court's finding to the contrary was based entirely on new testimony introduced for the first time in court and not presented to the Commission. We think the court below erred in permitting the Commission's order to be annulled on a record other than that made before the Commission, and we have presented this question, among others, in our assignments of error.

In its motion, appellee also contends that the Commission may not correct a water carrier's certificate without violating the Fifth Amendment. Such a question is obviously one for resolution by this Court after argument on the merits.

It is respectfully submitted that the motion to dismiss or affirm should be denied and probable jurisdiction noted.

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